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Nos. 94-1893, 94-1900

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES OF AMERICA, *et al.*,
Petitioners,
v.
CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF VIRGINIA, *et al.*,
Respondents.

NATIONAL CABLE TELEVISION ASSOCIATION, INC.,
Petitioner,
v.
BELL ATLANTIC CORPORATION, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF OF U S WEST, INC. AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

LLOYD N. CUTLER
Counsel of Record
LOUIS R. COHEN
WILLIAM T. LAKE
STEVEN M. DUNNE
LYNN CHARYTAN
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037
(202) 663-6000
Counsel for U S WEST, Inc.

CHARLES P. RUSS III
STUART S. GUNCKEL
DAVID S. SATHER
NORTON CUTLER
1801 California Street
Denver, Colorado 80202

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U S WEST, Inc. ("U S WEST") respectfully submits this brief as *amicus curiae* in support of respondents, urging affirmance of the decision below. Written consents of all parties to the filing of this brief have been filed with the Clerk pursuant to Supreme Court Rule 37.3.

INTEREST OF THE *AMICUS CURIAE*

U S WEST and its subsidiaries and affiliates provide local telephone service to customers in 14 western states with a total population of more than 30 million people. U S WEST wishes to provide cable television service, in competition with existing cable operators, within this 14-state regon, but 47 U.S.C. 533(b) ("section 533(b)"), if valid, would by its terms prohibit U S WEST from doing so.

U S WEST, joined by other local telephone companies, brought suit against the federal petitioners in the U.S. District Court for the Western District of Washington, seeking to establish its right under the First Amendment to provide such video programming. The district court granted summary judgment for the plaintiffs, holding that section 533(b) unnecessarily "sacrifices" the First Amendment rights of U S WEST and other telephone companies because it is not narrowly tailored to serve any substantial governmental interest. *U S WEST, Inc.* v. *United States*, 855 F. Supp. 1184, 1193 (W.D. Wash. 1994).

The Ninth Circuit affirmed, concluding for similar reasons that section 533(b) violates the First Amendment. *U S WEST, Inc.* v. *United States*, 48 F.3d 1092 (9th Cir. 1995). Judge Hall, writing for a unanimous panel, first determined that the video programming ban should be subjected to intermediate scrutiny in light of this Court's decision in *Turner Broadcasting System, Inc.* v. *FCC*, 114 S. Ct. 2445 (1994). *See* 48 F.3d at 1097-100. She then concluded that there was no evidence to support two "interests" proffered by the Government as reasons for sustaining section 533(b): to prevent telephone companies from limiting access to poles and conduits, and to promote diversity by preventing telephone companies from monopolizing the cable television industry. *Id.* at 1102-03. As for a third argument—that the video programming ban reduces incentives for telephone companies to "cross-subsidize" cable operations by shift-

ing costs to regulated telephone operations—the court found that although there was a question whether the statute serves this purpose at all, there was no doubt that section 533(b) is not narrowly tailored to meet such a concern. *Id.* at 1103-06. Citing several examples of steps the Government could take, short of a sweeping ban on speech, to prevent anti-competitive behavior such as cross-subsidization, the court held that section 533(b) is not narrowly tailored and thus fails First Amendment scrutiny. *Id.* at 1104-06. The court also firmly rejected the Government's argument that Congress, in not repealing section 533(b), implicitly made legislative findings to which the court should defer. *Id.* at 1100-01, 1106. The court of appeals refused to accept "congressional *inaction* as persuasive evidence . . . of Congress's having 'found' anything." *Id.* at 1106.

For similar reasons, in the present case, the Court of Appeals for the Fourth Circuit held that section 533(b) violates the First Amendment. Eight other district courts have also concluded that the video programming ban is unconstitutional, and no court has held to the contrary. *See* Response to Petitions for Writ of Certiorari 4 n.2 (listing cases). U S WEST, like respondents, has an interest in offering video programming in its local telephone service area. U S WEST submits this brief in support of respondents' position that prohibiting this speech activity violates the First Amendment.

STATEMENT OF THE CASE

We adopt respondents' statement of the case. However, because this brief focuses in part on the FCC's *Third Report and Order*,[1] we briefly summarize it here. The *Third Report and Order* is reprinted in the Appen-

[1] *Telephone Company—Cable Television Cross-Ownership Rules, Sections 63.54-63.58, Third Report and Order*, 10 FCC Rcd 7887 (1995), petition for review filed *sub nom. GTE California Inc.* v. *FCC*, No. 95-70518 (9th Cir. June 28, 1995).

dix to the Supplemental Brief of Petitioners in Support of Petition for a Writ of Certiorari ("Pet. Supp. App." 1a-21a).[2]

In the *Third Report and Order*, the FCC reinterpreted section 533(b)'s "good cause" waiver provision, saying it was doing so in order to avoid the "serious question as to whether Section [533](b) unnecessarily burdens substantially more speech than is necessary to promote competition in the multi-channel video programming market." Pet. Supp. App. 6a. The waiver provision states that "upon [a] showing of good cause, the Commission may, on petition for waiver, waive the applicability of" the telephone company in-region video programming bar. 47 U.S.C. 533(b)(4). Before granting a waiver, the FCC must find that "the issuance of such waiver is justified by the particular circumstances demonstrated by the petitioner, taking into account the policy of this subsection." *Id.*

Until the *Third Report and Order*, the agency had found "good cause" to support a waiver only where the applicant could "demonstate" that the waiver was needed and would serve the public interest in that "particular case[]." *Revision of the Processing Policies for Waivers of the Telephone Company—Cable Television Cross Ownership Rules*, 69 F.C.C.2d 1097, 1111 (1978). Under the new regime announced in the *Third Report and Order*, the FCC has determined that "good cause" now exists to grant waivers more broadly, because "the cable industry has grown from a fledgling service to a more mature industry that now serves a majority of households" and thus, in the agency's view, the "relevant circumstances

[2] "Gov't Br." refers to the Brief for the Federal Petitioners. "NCTA Br." refers to the Brief for Petitioner National Cable Television Association, Inc. "Pet. App." refers to the appendix to the petition for certiorari in No. 94-1893. "J.A." refers to the Joint Appendix.

have changed greatly since" the adoption of the telephone company video programming ban. Pet. Supp. App. 11a.

The agency did not, however, conclude that the statute required it to grant a waiver automatically to every interested telephone company; nor did it clearly set forth the circumstances in which waivers will be granted. The FCC simply determined that it was authorized to use its discretion to grant waivers, *id.* at 17a, and it announced a policy of granting waivers where it finds that a telephone company has agreed "to abide by the regulations [the FCC] *will* establish governing [the] provision of video programming." *Id.* at 19a (emphasis added). The agency did not state specifically what those future regulations will be, merely announcing that waivers will be "subject to . . . any further rules we will enact." *Id.* at 20a. Although the FCC indicated that telephone companies might be allowed to provide video programming over video dialtone systems that "include[] a common carriage element," *id.* at 13a, the agency expressly declined to decide, for example, what regulatory regime will apply, *id.* at 3a, or whether a telephone company will be allowed "to build a traditional cable system in its telephone service area in competition with an existing cable service." *Id.* at 17a n.46.

SUMMARY OF ARGUMENT

The court of appeals (and the Ninth Circuit in the *U S WEST* case) ruled that section 533(b) cannot survive intermediate First Amendment scrutiny because its blanket ban on in-region provision of video programming is too broad to serve any proffered governmental purpose. In this Court, petitioners make two arguments for reversal:

1. The courts should defer to supposed congressional findings that the blanket ban is necessary to prevent cross-subsidization and that no lesser regime will suffice.

2. In any event, the FCC has cured the lack of narrow tailoring by announcing that it will interpret the statute's "good cause" waiver provision expansively so as to allow telephone companies to provide some in-region video programming (albeit under conditions that have not yet been fully specified).

Each of these arguments is flawed, and each fatally undercuts the other. As to the first argument, the legislative record does not support petitioners' claim that Congress found that a complete ban on video programming is necessary to prevent cross-subsidization. No such finding is explicit or implicit in the 1984 enactment of the statute, and no such finding may properly be inferred from subsequent congressional inaction. Moreover, petitioners ignore the most recent congressional activity concerning the need for a blanket ban: the passage in both Houses of bills that would repeal section 533(b). Finally, the FCC's *Third Report and Order*, which describes sweeping changes in circumstances and begins to construct a new regulatory regime based on broad waivers to allow telephone companies to provide video programming on "video dialtone" platforms, completely undercuts the same agency's argument to this Court that Congress sees a continuing need for a complete ban.

As to the second argument, the FCC cannot save section 533(b) from invalidation by changing its own waiver policy. Courts and agencies have, in some cases, saved statutes from First Amendment attack by construing their substantive provisions to avoid a constitutional issue. Petitioners invoke such cases here, but that is not at all what the FCC has done in this instance. Under the *Third Report and Order*, telephone companies would remain subject to an unconstitutional blanket statutory ban on a protected form of speech. The FCC has said only that it intends, as a matter of administrative grace, to forgive compliance in some situations. This agency action does

not make the statute itself any more constitutional than before, and it does not moot the constitutional issue because the agency forgiveness is at best partial, subject to conditions not yet fully defined, and subject to change. Indeed, unbridled FCC discretion to dole out otherwise prohibited speaking opportunities would only make the situation worse.

ARGUMENT

I. THE VIDEO PROGRAMMING BAN IS NOT NARROWLY TAILORED TO MEET ANY PROFFERED GOVERNMENTAL INTEREST, AND CONGRESS HAS NEITHER EXPLICITLY NOR IMPLICITLY FOUND THAT THE BAN IS NECESSARY

A. There Has Been No Congressional Finding That a Complete Ban on Telephone Company Provision of Video Programming Is Necessary To Serve the Interests Proffered by the Government

The Government concedes that section 533(b) "completely exclud[es] [telephone companies] from cable programming in their service areas." Gov't Br. 25. The Government claims, however, that this complete ban survives intermediate scrutiny because it is narrowly tailored to prevent cross-subsidization by telephone companies entering the cable television market.[3] To the contrary, every

[3] The Government also contends that the video programming ban is necessary to prevent telephone companies from "abusing their control" over poles and conduits and telephone networks. Gov't Br. 35-37. But this "pole access" argument fails at the threshold. The Government relies on the FCC's statement *in 1970* that it was adopting the rule later codified as section 533(b) out of concern that telephone companies might use their control over utility poles and conduits to hinder the development of an independent cable television industry. *Id.* at 35. But by 1981, three years *before* Congress adopted section 533(b), the FCC's Office of Plans and Policy had already concluded that such concerns did not justify the video programming ban. *FCC Policy on Cable Ownership: A Staff Report* 162 (1981) (J.A. 160-61). The FCC strongly re-

expert federal agency that has examined the question, including both the FCC and the Department of Justice, has concluded that much more limited—and better targeted—regulatory safeguards than a complete ban on video programming can meet any risk of cross-subsidy.

For example, when the FCC formally recommended the repeal of section 533(b) in its 1992 *Video Dialtone Order*, it explicitly concluded that existing regulatory safeguards, such as detailed cost allocation and accounting rules,[4] regulations ensuring equal treatment of nonregulated services provided over telephone networks,[5] and the development of "price cap" regulation,[6] were "sufficient . . . to protect against cross-subsidization." 7 FCC Rcd 5781, 5828-29 (1992). The FCC's *Third Report and Order*, discussed in detail below, dramatically reiterates the FCC's determination that regulatory safeguards would provide ample protection against any potential for cross-subsidization. The Antitrust Division of the Justice Department agrees that concerns about anticompetitive

affirmed this position in its 1992 *Video Dialtone Order*, finding that the passage of the Pole Attachment Act of 1978, 47 U.S.C. 224 (b)(1), and the cabling of almost the entire country had long ago rendered such concerns obsolete. *Telephone Company—Cable Television Cross-Ownership Rules, Sections 63.54-63.58, Second Report and Order, Recommendation to Congress, and Second Further Notice of Proposed Rulemaking*, 7 FCC Rcd 5781, 5849 (1992), modified in part on recon., 10 FCC Rcd 244 (1994), petition for review filed *sub nom. Mankato Citizens Telephone Co.* v. *FCC*, No. 92-1404 (D.C. Cir. Sept. 9, 1992). For these reasons, and because section 533(b) does not prohibit the provision of video transport services, the Ninth Circuit found no evidence to support this rationale for the statute. *U S WEST*, 48 F.3d at 1102-03.

[4] *See Southwestern Bell Corp.* v. *FCC*, 896 F.2d 1378 (D.C. Cir. 1990).

[5] *See California* v. *FCC*, 39 F.3d 919 (9th Cir. 1994), cert. denied, 115 S. Ct. 1427 (1995).

[6] *See National Rural Telecom Ass'n* v. *FCC*, 988 F.2d 174, 178 (D.C. Cir. 1993).

behavior do not justify retaining section 533(b).[7] The National Telecommunications and Information Administration (NTIA) at the Department of Commerce has similarly concluded that such concerns are "either overstated or can be effectively ameliorated by adapting existing regulatory safeguards to suit the video programming marketplace." [8]

Because the expert agencies have long since concluded that section 533(b) is not needed to prevent cross-subsidization, the Government falls back on a deference argument: "*Congress* reasonably concluded that the cross-ownership bar is necessary to prevent cross-subsidization by [telephone companies] in the cable market effectively." Gov't Br. 31 (emphasis added). The Government then asks the Court to defer to this supposed congressional "judgment." *Id.* at 28-29; *see id.* at 32 n.21. Similarly, petitioner NCTA asserts that "there is no adequate basis for the judiciary to set aside *the congressional judgment* on the issue here." NCTA Br. 44 (emphasis added).

The lower courts, including the Ninth Circuit in the *U S WEST* case, have firmly rejected this call for deference because there is simply no reason to believe that Congress ever made—in formal findings or anywhere else—any such "judgment." When Congress passed section 533(b) in 1984, it codified, essentially without comment, an FCC rule adopted in 1970 for the infant cable industry out of concern that telephone companies might "preempt the market for [cable television] service." [9] The

[7] Reply Comments of the U.S. Department of Justice, *Telephone Company—Cable Television Cross-Ownership Rules* 44 (Mar. 13, 1992) (J.A. 341-42).

[8] NTIA, U.S. Dep't of Commerce, *The NTIA Infrastructure Report: Telecommunications in the Age of Information* 235 (1991) (J.A. 343).

[9] *Applications of Telephone Companies for Section 214 Certificates for Channel Facilities Furnished to Affiliated Community Antenna Television Systems, Final Report and Order*, 21 F.C.C.2d

1984 Congress made no relevant findings of fact in the statute itself, and the single reference to section 533(b) in the legislative history merely explains that Congress intended to codify the earlier FCC rule.[10] (This case is thus unlike *Turner Broadcasting*, which involved a statutory provision supported by "unusually detailed statutory findings." 114 S. Ct. at 2461; *see id.* at 2454-55, 2469.) Moreover, there is no indication that Congress even considered, and no reason whatever to assume that it reached any judgment about, the problem of cross-subsidization; the supposition that cross-subsidization can be effectively prevented only by a complete ban, and not by less severe regulatory alternatives, is a litigator's supposition that there is no basis whatever for attributing to Congress. *See U S WEST*, 48 F.3d at 1100-01, 1106. As the D.C. Circuit recently concluded after a thorough examination of section 533(b) and its legislative history, "Congress itself has never embraced [this] purpose[] as its own." *American Scholastic TV Programming Foundation* v. *FCC*, 46 F.3d 1173, 1182 (D.C. Cir. 1995).[11]

307, 324 (1970), aff'd *sub nom. General Telephone Co.* v. *United States*, 449 F.2d 846 (5th Cir. 1971).

[10] H.R. Rep. No. 934, 98th Cong., 2d Sess. 56 (1984). Another passage describes section 533 as a whole as intended "to prevent the development of local media monopolies, and to encourage a diversity of ownership of communications outlets." *Id.* at 55. Logically, this reference must have pertained to other portions of section 533, such as a broadcast station/cable cross-ownership ban and a later-deleted newspaper/cable cross-ownership ban, because a common carrier telephone service is *not* a medium or "outlet" for owner communications. Telephone companies carry third-parties' messages from one customer to another. *See U S WEST*, 855 F. Supp. at 1187. In any event, this statement of the general purposes behind section 533 does not imply a congressional judgment that a total ban on video programming is necessary to prevent any particular phenomenon.

[11] The petitioners in *American Scholastic*, like the Government here, argued that the purposes of section 533(b) are to prevent problems with pole access and to prevent cross-subsidization. The

Given the admittedly "sparse" legislative history, NCTA Br. 32, petitioners are forced to argue that the failure of Congress since 1984 to repeal section 533(b) amounts to a congressional "judgment" that nothing short of a complete ban will suffice. The Government points to hearings and staff reports on proposals to repeal section 533(b) that never made it out of committee as evidence that Congress as a whole—sometime after 1984—decided to reject less restrictive regulatory alternatives to a complete ban. *See* Gov't Br. 8-11, 31-34; NCTA Br. 16-17, 35 n.28. But this Court has repeatedly rebuffed efforts to divine legislative judgments from Congress's failure to act, explaining that "Congressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction." *Pension Benefit Guarantee Corp.* v. *LTV Corp.*, 496 U.S. 633, 650 (1990) (internal quotation marks and citation omitted); *see Central Bank* v. *First Interstate Bank*, 114 S. Ct. 1439, 1453 (1994). Congress's failure to repeal section 533(b) in the last decade, in the face of dramatic changes in the cable television market and findings by the relevant expert agencies that the statute unnecessarily limits competition and diversity, says nothing about Congress's attitude toward less draconian alternatives. As the district court concluded below: "[N]owhere in the legislative materials is there any indication that Congress reached a conclusion concerning the effectiveness of less restrictive regulatory measures." Pet. App. 100a; *accord U S WEST*, 48 F.3d at 1106.

If congressional views, unembodied in enacted legislation, were a proper basis for determining whether particular legislation is needed to solve an alleged problem, then the best evidence of Congress's present views would be the recent passage, by both Houses, of bills that would repeal section 533(b). Petitioners' recitations of the

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court found that Congress "has never in law or legislative history specifically adopted these purposes." 46 F.3d at 1182.

"subsequent legislative history" of section 533(b) end prematurely in 1992, *see* Gov't Br. 8-11; NCTA Br. 15-17, omitting what is clearly the most important evidence of Congress's views. In 1994, the House of Representatives approved by a vote of 423 to 4 a bill (H.R. 3636) that would have repealed section 533(b), 140 Cong. Rec. H5247-48 (daily ed. June 28, 1994), and the committee report accompanying the bill declared that the rationale for a video programming ban was "no longer valid." H.R. Rep. No. 560, 103d Cong., 2d Sess. 47 (1994). Senate committees also approved several bills in 1994 that would have repealed section 533(b). *See, e.g.*, S. Rep. No. 367, 103d Cong., 2d Sess. (1994) (reporting S. 1822).

Once again this year, Congress is working on legislation that would repeal the video programming ban. In June, the full Senate passed by a vote of 81 to 18 a bill (S. 652) that would repeal section 533(b) and allow telephone companies and their affiliates to provide video programming either through a cable system as a traditional cable operator or though a video dialtone system.[12] 141 Cong. Rec. S8480 (daily ed. June 15, 1995). In August, the House of Representatives passed a similar bill (H.R. 1555), which would allow telephone companies (through affiliates) to provide video programming directly to local subscribers through either cable systems or video dialtone platforms.[13] 141 Cong. Rec. H8506-07

[12] The Government's description of the Senate bill as allowing telephone companies "to offer video programming through video dialtone systems," Gov't Br. 16 n.12, is misleadingly terse. The bill would also allow a telephone company to provide in-region video programming as a traditional cable operator, without creating a video dialtone system. *See* S. 652, 104th Cong., 1st Sess. § 202(a).

[13] The Government's description of the House bill is also inaccurate. The Government states that H.R. 1555 would allow telephone companies "to offer video programming to subscribers in their service areas, through video dialtone platforms operated by separate affiliates." Gov't Br. 16 n.12. In fact, as passed by the House, H.R. 1555 would also allow telephone companies to offer

(daily ed. Aug. 4, 1995) (approved by a vote of 305 to 117). The committee report on the bill declares that "[t]elephone company competition with the entrenched cable operators would enable consumers to benefit from lower rates, better quality service, improved maintenance, and a larger diversity of new information services." H.R. Rep. No. 204, 104th Cong., 1st Sess. 53 (1995). These recent legislative developments refute the Government's contention that Congress has failed to repeal section 533(b) because it has a "judgment" that regulatory alternatives short of a complete video programming ban would not be adequate to prevent cross-subsidization.

Of course, "Congress is not obligated, when enacting its statutes, to make a record of the type that an administrative agency or court does to accommodate judicial review." *Turner Broadcasting*, 114 S. Ct. at 2471 (plurality opinion). But when the Government seeks to defend a broad statutory ban on speech, deemed unnecessary and counterproductive by all the expert agencies, by arguing that all these views are trumped by a congressional judgment that no lesser restriction will suffice, the Government must at least show that Congress actually made such a judgment. The Government's lawyers may not simply posit a problem and then claim that Congress, by adopting a sweeping restriction on speech (without explanation) and then failing to repeal it, must have decided that the infringement on speech is necessary to meet the problem posited. *See id.* at 2470 (plurality opinion); *Los Angeles* v. *Preferred Communications, Inc.*, 476 U.S. 488, 496 (1986) ("This Court may not simply assume that the ordinance will always advance the asserted state interests sufficiently to justify its abridgement of expres-

video programming through separate affiliates acting as traditional cable operators. H.R. 1555, 104th Cong., 1st Sess. § 201. In addition, the bill would allow telephone companies, under certain conditions, to obtain a waiver from the requirement of using a separate video programming affiliate. *See id.* § 201(b).

sive activity") (internal quotation marks and citation omitted).

Moreover, even if Congress had judged it necessary to impose a sweeping ban on speech to address the issue of cross-subsidization, it remains the Court's responsibility "in the end to decide whether Congress has violated the Constitution." *Sable Communications, Inc.* v. *FCC*, 492 U.S. 115 (1989). For that reason, "[d]eference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake." *Landmark Communications, Inc.* v. *Virginia*, 435 U.S. 829, 843 (1978). This principle was dramatized in the *Turner Broadcasting* case, where this Court vacated the lower court's judgment that the "must-carry" provisions of the 1992 Cable Act were constitutional despite the presence of extensive findings of fact supporting the must-carry rules in the text of the Act itself. *See* 114 S. Ct. at 2454-55; *id.* at 2470-72 (plurality opinion). As the Government acknowledges, it carries the burden of proving that "Congress has drawn reasonable inferences based on substantial evidence." *Turner Broadcasting*, 114 S. Ct. at 2471 (plurality opinion); *see* Gov't Br. 32 (quoting *Turner Broadcasting*). In this case, that burden is insurmountable, because the Government has neither the substantial evidence nor any basis for concluding that Congress actually drew the supposed inferences.

B. The FCC's *Third Report and Order* on Telephone Company Provision of In-Region Video Programming Fatally Undercuts the Argument That Congress Has Determined That a Blanket Ban Is Necessary

To prevail, the Government must prove that section 533(b) does not "burden substantially more speech than is necessary to further the government's legitimate interests." *Ward* v. *Rock Against Racism*, 491 U.S. 781, 799 (1989); *see Turner Broadcasting*, 114 S. Ct. at 2469 (quoting *Ward*); *id.* at 2470, 2472 (plurality opinion).

If there are "constitutionally acceptable less restrictive means of achieving the Government's asserted interests," *id.* at 2472 (plurality opinion) (internal quotation marks and citation omitted), then the statute is not narrowly tailored. The Government may not ignore "alternative, less drastic measures" by which it could protect its asserted interests in favor of a broad ban on speech. *City of Cincinnati* v. *Discovery Network, Inc.*, 113 S. Ct. 1505, 1510 n.13 (1993).

Even before the FCC's *Third Report and Order*, the Commission, along with every other expert telecommunications agency, had concluded that regulatory safeguards fully addressed the cross-subsidy concerns proffered by petitioners in their attempt to justify section 533(b). The FCC has now not only stated that less restrictive regulatory safeguards can meet these concerns, it has decided that it will not enforce the blanket ban but instead will rely on such less severe measures. These FCC actions speak more loudly than its litigators' words.

According to the FCC, "[t]he relevant circumstances have changed greatly" since the Commission adopted the ban in 1970 and Congress codified it in 1984. Pet. Supp. App. 11a. As Congress found in the 1992 Cable Act, cable operators enjoy a firmly entrenched monopoly in most communities;[14] telephone companies cannot prevent the development of a viable and independent cable industry. *Id.* In addition, "significant advances in technology" have "made it possible for a multitude of programmers to reach end user[s]" and have "mitigated" the concerns about competition that originally led to the adoption of the video programming ban. *Id.* at 11a-12a. The dramatic changes noted by the FCC would eliminate

[14] Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 2(a)(2), 106 Stat. 1460.

the basis for any congressional judgment about regulatory alternatives that might have been made in 1984.[15]

Contrary to its litigation position in this Court, the FCC has concluded that under present conditions telephone companies should provide in-region video programming, subject to regulatory safeguards. According to the FCC, Congress intended when it adopted section 533(b) " 'to promote competition.' " Pet. Supp. App. 10a (quoting *NCTA* v. *FCC*, 914 F.2d 285, 287 (D.C. Cir. 1990)). If excluding one class of speakers ever promoted competition or a diversity of voices, today there is no doubt that it "promote[s] competition to allow a telephone company to provide video dialtone service in its telephone service area in competition with an existing cable company." *Id.* at 17a. The FCC "has developed a number of safeguards that are designed to prevent cross-subsidization and discrimination," *id.* at 14a n.35, and these safeguards provide a more narrowly tailored alternative to the complete ban in section 533(b).

In *Turner Broadcasting*, this Court vacated and remanded the lower court's decision because, among other reasons, "the record fail[ed] to provide any judicial findings concerning the availability and efficacy of 'constitutionally acceptable less restrictive means' of achieving the Government's asserted interests." 114 S. Ct. at 2472 (plurality opinion) (quoting *Sable Communications*, 492 U.S. at 129). In this case, the lower courts have made the necessary findings about the availability of less restrictive, better targeted means of addressing the Government's concerns. The court of appeals below, for example, found at least one "obvious, less-burdensome" alternative: Congress could limit the telephone companies' editorial control over video programming to a fixed percentage of the channels available. Pet. App. 47a-48a. The Ninth Circuit in *U S WEST* also found "substantial evidence tending to show that the procompetitive goals of § 533(b) can currently be achieved through a variety of less speech-restrictive means." 48 F.3d at 1105. That court noted many possibilities in the record, including structural separation requirements short of a complete ban, nonstructural safeguards such as cost allocation and accounting rules, requiring telephone companies to carry unaffiliated video programming (the alternative noted by the Fourth Circuit), and strictly enforcing general antitrust laws.

[15] The Government bears the burden of showing that the statute is constitutional under *present* circumstances, for even a " 'statute [constitutionally] valid when enacted may become invalid by change in the conditions to which it is applied.' " *Baker* v. *Carr*, 369 U.S. 186, 254 n.6 (1962) (quoting *Nashville, Chattanooga & St. Louis Ry.* v. *Walters*, 294 U.S. 405, 415 (1935)).

Since then, the FCC has essentially agreed with the lower courts—it has endorsed "obvious, less-burdensome" alternatives to a complete ban, better tailored to meet any concerns about cross-subsidization. Pet. Supp. App. 3a-6a. The FCC's conclusion reflects the Government's failure to create any record justifying the need for the broad ban on speech contained in section 533(b). As Justice O'Connor remarked in *Turner Broadcasting*: "If the Government wants to avoid fraudulent political fundraising, it may bar the fraud, but it may not in the process prohibit legitimate fundraising." 114 S. Ct. at 2479 (O'Connor, J., concurring in part and dissenting in part) (citing *Schaumberg* v. *Citizens for a Better Environment*, 444 U.S. 620 (1980), and *Edenfield* v. *Fane*, 113 S. Ct. 1792 (1993)). So too here—if the Government wants to avoid anticompetitive behavior, it may bar such behavior, but it may not in the process prohibit legitimate telephone company speech.

II. THE FCC's NEW INTERPRETATION OF ITS WAIVER AUTHORITY IN THE *THIRD REPORT AND ORDER* ONLY EXACERBATES THE STATUTE'S UNCONSTITUTIONALITY

A. The FCC's New Construction of the "Good Cause" Waiver Provision Does Not Alter Section 533(b)'s Unconstitutional Blanket Ban on Telephone Company Provision of In-Region Video Programming

In plain language, section 533(b) bars telephone companies from providing video programming to subscribers in their telephone service areas. The statute states unequivocally that it "shall be unlawful" for a telephone company "to provide video programming directly to subscribers" or to provide "channels of communications" to an entity that it controls if those channels are "to be used for, or in connection with, the provision of video programming directly to subscribers in the telephone service area of the common carrier." 47 U.S.C. 533(b)(1), (2). The Government's own description of section 533(b) is that it "completely exclude[s] [telephone companies] from cable programming in their service area." Gov't Br. 25. As respondents and supporting *amici* have amply demonstrated, and the lower courts have unanimously concluded, this blanket ban unconstitutionally restricts speech.

Petitioners, invoking cases like *NLRB* v. *Catholic Bishop of Chicago,* 440 U.S. 490 (1979), argue that the FCC has recently found a "saving" construction of the statute that "eliminates the constitutional objections to the statutory regime." Gov't Br. 39; *see* NCTA Br. 26-34; Gov't Br. 39-43. But the FCC has done no such thing. As the *Third Report and Order* makes clear, the FCC has *not* given the substantive provisions of section 533(b) a narrowing construction that eliminates the unconstitutional restriction on telephone company speech.[16]

[16] The Commission acknowledges that section 533(b) "prohibits a telephone company from operating a cable system where it has a monopoly on local telephone company service" and "*does* generally bar a telephone company from selecting (or 'exerting editorial control over') and providing the video programming carried over its wires in its local service area." Pet. Supp. App. 3a (emphasis in original).

The FCC has merely (i) construed its own "good cause" waiver authority under section 533(b)(4) broadly and (ii) expressed an agency policy determination that it will henceforth exercise that authority generously.[17] This FCC action does not free telephone companies from the unconstitutional statutory ban; it merely promises freedom to speak, in circumstances not yet specified, as a matter of agency grace. The FCC says only that "telephone companies may seek a waiver of the statutory restriction in order to provide programming directly to subscribers over video dialtone facilities where they have a monopoly on local exchange telephone service." Pet. Supp. App. 15a. As NCTA explains, "the Commission's construction of Section 533(b)(4) will leave the presumptive statutory bar in place for all telephone companies that, though they may wish otherwise, fail to act in accord with the behavioral requirements made conditions of the waiver." NCTA Br. 32.

Petitioners invoke the general principle that courts engaged in statutory interpretation should attempt, when choosing among reasonable alternatives, to construe statutes to avoid constitutional problems. *See* NCTA Br. 26-27; Gov't Br. 40-41. But that canon of statutory construction has no application here. Petitioners' so-called "saving" construction of section 533(b) does not construe the substantive provisions of the statute so as to eliminate an infringement on First Amendment activity. This case is not at all like *Catholic Bishop,* where the

[17] "[W]e construe Section [533](b)(4), the waiver provision, as authorizing us to permit telephone companies to act as programmers on video dialtone systems pursuant to certain conditions." Pet. Supp. App. 9a.

Court construed the National Labor Relations Act not to apply to teachers in parochial schools and thereby avoided serious freedom of religion concerns, 440 U.S. at 507; nor is it like *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Building & Construction Trades Council*, where the Court construed the same statute not to apply to peaceful handbilling and thereby avoided serious freedom of speech concerns, 485 U.S. 568, 575-88 (1988). Here, the FCC has not construed the substantive provisions of the statute at all: both before and after the FCC's new construction, the statute prohibits a large amount of protected speech without any adequate reason for doing so. Such a statute is not "saved" by the responsible agency's promise not to enforce it in some cases under conditions the agency unilaterally adopts.

The Government argues that the possibility that a telephone company can obtain a waiver to provide in-region video programming "removes any objections to the tailoring of the congressional regime" by offering a "less burdensome alternative" to the total ban. Gov't Br. 42. This Court rejected an indistinguishable argument in *Secretary of State of Maryland* v. *J.H. Munson Co.*, 467 U.S. 947 (1984). In holding that a percentage restriction on charitable solicitation was not narrowly tailored to meet any substantial governmental interests and thus was unconstitutional on its face, *id.* at 965-66, the Court noted that the statute's waiver provision was unavailing: "The possibility of a waiver may decrease the number of impermissible applications of the statute, but it does nothing to remedy the statute's fundamental defect." [18]

[18] In the *Third Report and Order*, the FCC attempts to distinguish *Munson* by arguing that a liberal application of the section 533(b) waiver "furthers rather than hinders First Amendment interests" by creating additional speaking opportunities. Pet. Supp. App. 18a-19a. The Court rejected this argument in *Munson*, noting that where the statute itself "is so poorly suited to accomplishing the State's goal, and where there are alternative means to serve the same purpose, there is little justification for straining to salvage the statute by invoking the possibility of official dispensation to engage in protected activity." 467 U.S. at 964 n.12.

Id. at 968; *see also Lovell* v. *City of Griffin*, 303 U.S. 444 (1938) (blanket ban on speech ruled facially unconstitutional notwithstanding license procedure that might have permitted petitioner to engage in the speech activity).

B. The FCC's Promise of Administrative Charity Does Not Vindicate Telephone Companies' First Amendment Rights

Under the regime contemplated by the *Third Report and Order*, the video programming ban would remain in place, and telephone companies would be dependent on the FCC for the right to provide video programming to in-region customers. This is not a satisfactory cure for the First Amendment problems of the statute, for at least two reasons.

First, the FCC's new regime would remain subject to change in the FCC's discretion. The FCC based its new interpretation of the statute's waiver provision on the "changed circumstances" that characterize the 1995 cable market as compared to the 1970 or 1984 cable markets. These changed circumstances, the agency said, qualify as the type of "good cause" contemplated by section 533(b)(4). Pet. Supp. App. 9a-13a; *see* Gov't Br. 40. But nothing prevents the agency from changing its mind again, with or without another change of circumstances, real or perceived. Indeed, the FCC is not bound even by its pronouncement that "the rules [it] will promulgate in the immediate future to authorize telephone companies to provide video programming in their service areas will constitute 'particular circumstances . . . taking into account the policy' of Section [533](b)." Pet. Supp. App. 13a. The agency is free at any point to require an additional showing by telephone companies that "particular circumstances" justify individual waivers, or to change

the rules that constitute such circumstances. Because the underlying video programming ban remains in effect, the agency is free to modify its policy as it deems necessary, leaving telephone companies with greater or lesser restrictions on their opportunities for speech.

Second, the FCC has not fully set out even the conditions under which it *now* proposes to dispense its administrative charity. In the *Third Report and Order*, the FCC claims the authority "to permit telephone companies to act as programmers on video dialtone systems *pursuant to certain conditions.*" Pet. Supp. App. 9a (emphasis added). The agency admits, however, that it has not yet determined what those "conditions" are, leaving open such major issues as "whether telephone companies may provide video programming over video dialtone networks rather than as traditional cable operators" and whether they will be regulated under Title II or Title VI of the Communications Act. *Id.* at 3a; *see id.* at 14a n.36. The FCC promises to "address the terms and conditions under which telephone companies should be permitted to provide video programming directly to subscribers in their local service areas in a subsequent order," *id.* at 6a n.11, but it provides no timeframe for doing so.[19] Any decisions

[19] The FCC generally suggests that telephone company in-region video programming ventures would be subject to video dialtone platform rules and could not utilize an anchor programmer. Pet. Supp. App. 13a. Yet even those issues are explicitly left open in the Commission's *Fourth Notice of Proposed Rulemaking*, on which the Commission has yet to act. *See Telephone Company—Cable Television Cross-Ownership Rules, Sections 63.54-63.58, Fourth Further Notice of Proposed Rulemaking*, 10 FCC Rcd 4617 (1995) (Pet. App. 113a). Petitioner NCTA suggests a host of additional "conduct-specific" conditions that the agency might apply to telephone companies seeking waivers, including operating stand-alone cable systems, complying with Title VI of the Communications Act, and requirements relating to corporate structure, accounting methods, audits, and nondiscriminatory practices. NCTA Br. 32. To date, the agency has not adopted or rejected these proposals or any other specific rules.

the FCC does reach in the future will likely face lengthy administrative and judicial challenges.[20] This remarkable uncertainty regarding the terms of possible administrative waivers of section 533(b) underscores the immediate practical difference between a judicial decision striking down the statute and ongoing administrative proceedings that dole out speaking opportunities on a schedule the agency has yet to determine.

C. The FCC's Enlargement of Its Own Administrative Discretion Only Exacerbates the Problem

The FCC's broad waiver policy also creates its own, additional First Amendment concerns by creating a "licensing" process in which telephone companies may exercise their First Amendment rights only if the FCC, in its discretion, approves. The "good cause" waiver policy is not a blanket authorization for all telephone companies to provide in-region video programming. It merely *authorizes* the FCC to dispense speaking opportunities to telephone companies that file specific waiver requests. *See* Pet. Supp. App. 15a; NCTA Br. 31-32. The grant of such a waiver by the FCC will rest "upon compliance with regulations to be published that will be designed to prevent anti-competitive conduct." Gov't Br. 41. The waiver policy therefore vests unimpeded discretion in the agency to determine whether telephone companies seeking to offer in-region video programming should be permitted to do so.

It is fundamental in First Amendment jurisprudence that a statute requiring a "license" for the dissemination of ideas and placing discretion in the hands of government officials to grant or deny the license "creates a threat of censorship that by its very existence chills free speech." *Munson*, 467 U.S. at 964 n.12. As this Court observed in *City of Lakewood* v. *Plain Dealer Publishing Co.*, the

[20] *See, e.g.*, *GTE California Inc.* v. *FCC*, No. 95-70518 (9th Cir. June 28, 1995) (petition for review of *Third Report and Order*).

Government "may not condition . . . speech on obtaining a license or permit from a government official in that official's boundless discretion." 486 U.S. 750, 764 (1988) (emphasis omitted). "[I]n the absence of narrowly drawn, reasonable and definite standards for the officials to follow," license requirements create the possibility for abuse and censorship of First Amendment rights. *Niemotko* v. *Maryland*, 340 U.S. 268, 271-72 (1951); *see Cox* v. *Louisiana*, 379 U.S. 536, 555-557 (1965); *Kunz* v. *New York*, 340 U.S. 290, 294 (1951); *Saia* v. *New York*, 334 U.S. 558 (1948); *Cantwell* v. *Connecticut*, 310 U.S. 296, 305 (1940); *Schneider* v. *State (Town of Irvington)*, 308 U.S. 147, 163-64 (1939).

The Government suggests that the FCC's proposed "good cause" waiver "does not raise any of the constitutional concerns that have been associated with waiver provisions in other First Amendment contexts," Gov't Br. 41, because the FCC will "'routinely' grant waivers of the cross-ownership bar . . . to [telephone companies] that agree to abide by [the agency's] safeguards in their video dialtone systems," *id.* at 39-40. Those "safeguards," however, have not been specified and will be decided by the FCC based on its judgment concerning the circumstances under which telephone companies should be permitted to exercise their First Amendment rights. The Court is thus asked to hold that section 533(b) is constitutional based on nothing more than a promise by the FCC that the agency will restrict itself from exercising its discretion in an unconstitutional manner.

Such circular arguments and unsubstantiated promises cannot sidestep the statute's plain, unconstitutional language. In *City of Lakewood*, this Court rejected the invitation to presume that "the mayor will deny a permit application only for reasons related to the health, safety, or welfare of Lakewood citizens, and that additional terms and conditions will be imposed only for similar reasons," reasoning that this "is the very presumption that the doctrine forbidding unbridled discretion disallows." 486 U.S. at 770. As the Court ruled, "[t]o allow these illusory 'constraints' to constitute the standards necessary to bound a licensor's discretion renders the guarantee against censorship little more than a high-sounding ideal." *Id.* at 769-70.

D. There Is No Reason Now To Address the New Regime the FCC Has Proposed To Replace the Blanket Ban Enacted by Congress

In the court of appeals below, in the Ninth Circuit, and in district courts across the country, the Government argued that the courts should not substitute their own views, or the views of the FCC, for the policy views that the Government's litigators attributed to Congress. In the first part of its brief in this Court, the Government continues to argue that "the courts owe substantial deference" to Congress's supposed "predictive judgment" that a blanket ban on telephone company provision of cable television service is necessary. Gov't Br. 32 n.21.

The Government's final argument, by contrast, takes Congress out of the picture. The Government argues that since the FCC has concluded that circumstances have changed substantially and has substituted a dramatically different regulatory regime based on video dialtone platforms and waivers, the Court should ignore the constitutional defects in what Congress has done and sanction the agency's unilateral rewrite. Respondents and supporting *amici* have shown that the statute as Congress wrote it is unconstitutional and cannot be saved in this manner. There is, however, a further and final point: the FCC rewrite is premised on the very decisions the Government now asks this Court to reverse, is still incomplete, and has not been subjected to any review in the lower courts. There is therefore no reason for the Court to address the new regime now. The Court should affirm the decision of the Fourth Circuit and leave it to

Congress and the FCC to decide, subject to appropriate judicial review, what to do next.

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted,

LLOYD N. CUTLER
Counsel of Record
LOUIS R. COHEN
WILLIAM T. LAKE
STEVEN M. DUNNE
LYNN CHARYTAN
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037
(202) 663-6000
Counsel for U S WEST, Inc.

CHARLES P. RUSS III
STUART S. GUNCKEL
DAVID S. SATHER
NORTON CUTLER
1801 California Street
Denver, Colorado 80202

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